PP v. KAMARIAH ABDUL KADIR

HIGH COURT MALAYA, SHAH ALAM
AHMAD FAIRUZ ZAINOL ABIDIN JC
[CRIMINAL APPEAL NO: 41LB-50-07-2017]
19 JULY 2018

ROAD TRAFFIC: *Accident – Causing death by reckless or dangerous driving – Accused acquitted and discharged of offence – Appeal by prosecution – Prosecution relied on account of eyewitness as to how accident occurred – Whether account of eyewitness on how accident occurred admissible – Whether eyewitness saw actual collision – Whether accused drove recklessly – Whether prosecution successfully established prima facie case – Whether defence raised reasonable doubt on prosecution's case – Whether ingredients of offence established – Road Transport Act 1987, s. 41(1)*

The respondent was charged at the Magistrate's Court for causing death by reckless or dangerous driving, an offence under s. 41(1) of the Road Transport Act 1987 ('the RTA'). According to an eyewitness ('SP1'), (i) while driving her motorcar, she saw a woman on her motorcycle, straddled on the divider of the road; (ii) it was only after passing the said woman, she heard a loud sound and saw, through her side mirror, that an accident had occurred; (iii) she did not witness the actual collision; and (iv) she could not identify the woman on the motorcycle on the divider of the road as the respondent. As a result of the accident, the motorcycle rider died while the respondent suffered serious injuries. The investigating officer ('SP3') concluded that based on SP1's eyewitness account, the cause of the accident was due to the respondent riding her motorcycle recklessly into the path of the deceased who was riding his motorcycle. At the end of the prosecution's case, the Magistrate acquitted the respondent. The prosecution then filed an appeal to the High Court against the acquittal order and the High Court allowed the appeal. The respondent was ordered to enter her defence. In her defence, the respondent testified that she was riding her motorcycle, on the left side along the main road, when she was suddenly knocked from the back by another motorcycle on the divider. Once again, the respondent was acquitted and discharged. Hence, the present appeal by the prosecution. In support of their appeal, the prosecution submitted that, *inter alia*, the Magistrate erred in law when he did not consider the totality of the prosecution's evidence. The respondent argued that (i) there was an identity issue as the respondent was never identified by the prosecution to be the person riding a motorcycle on the divider; (ii) the point of impact on the motorcycles did not support the version of events presented by the prosecution; (iii) there was also no proof that the deceased died from a motor vehicle accident; and (iv) the respondent was knocked down from behind and the damage shown in the picture and PUSPAKOM report supported their version of the accident.

Held (dismissing appeal; affirming decision of Magistrate's Court):

(1) The essential ingredients of the offence created under s. 41(1) of the RTA are (i) a person who, (ii) by driving a motor vehicle recklessly; or (iii) by driving a motor vehicle at a speed; or (iv) by driving a motor vehicle in a manner which, having regard to the circumstances, including the nature, condition and size of the road and the amount of traffic which is or might be expected to be on the road, is dangerous to the public; and (v) causes the death of a person. Death as a result of the accident is not the sole determinant in deciding whether a person should face charge under s. 41 of the Act. (paras 9 & 11)

(2) There was no eyewitness that saw the fateful collision between the two motorcycles. In his investigation, SP3 based his conclusion that there was an eyewitness, SP1. However, SP1 only saw the impact of the accident. SP1 admitted that she did not see how the accident occurred but merely heard a loud sound behind her. Given the admission of SP1, the foundation of investigative findings of SP3 had crumbled. (paras 38-39)

(3) The scratch marks on the road was neutral evidence; they were evidence of an accident but they did not explain how it occurred. The explanation of the respondent, as to how the accident occurred, was supported by the PUSPAKOM report and her police report. The PUSPAKOM report favoured the version afforded by the respondent's defence that she was hit from behind by another motorcycle as she was travelling along the road. The damage to her motorcycle was consistent with the explanation which she had given. The point of impact was on the right side of the respondent's motorcycle and the damage to the deceased's motorcycle was to the front part. Therefore, there were two possible versions of how the accident could have been caused. It raised a doubt on the *prima facie* case established by the prosecution. (paras 40 & 42)

(4) The prosecution failed to prove the element of recklessness on the part of the respondent. Given that it was a subjective test that was to be applied, there must be an inquiry into the mind of the said person on what her assessment of the danger that she posed. It had to be enquired upon whether she recognised the obvious and serious risk. There was very little that could be gleaned from the facts presented by the prosecution to suggest that an evaluation could be made of the mental element in this case. (paras 44 & 45)

Case(s) referred to:
Ahmad Abdul & Ors v. PP [1987] 2 CLJ 207; [1987] CLJ (Rep) 437 HC ***(refd)***
Ahmad Najib Aris v. PP [2009] 2 CLJ 800 FC ***(refd)***
Azmi Osman v. PP & Another Appeal [2015] 9 CLJ 845 CA ***(refd)***
Gurdit Singh Ajaib Sing v. PP [1983] 1 CLJ 89; [1983] CLJ (Rep) 575 HC ***(refd)***
Mat v. PP [1963] 1 LNS 82 HC ***(refd)***
Mohamad Deraman v. PP [2011] 3 CLJ 601 CA ***(refd)***
Muhammad Rasid Hashim v. PP [2013] 1 CLJ 333 CA ***(refd)***
Ng Beng Kok v. PP [2017] 7 CLJ 157 CA ***(refd)***
PP v. Mat Zali Lahman [2010] 3 CLJ 354 HC ***(refd)***
PP v. Tan Chai Hing [2018] 6 CLJ 436 CA ***(refd)***
PP v. Zulkifli Omar [1998] 1 CLJ 1079 HC ***(refd)***
R v. Lawrence (1981) 73 Cr App R 1 ***(refd)***
Ramiah v. PP [1972] 1 LNS 120 HC ***(refd)***
Sia Soon Suan v. PP [1965] 1 LNS 165 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 167, 182A
Road Transport Act 1987, ss. 41(1), (4), 42, 43

For the prosecution - Yong Leou Shin; DPP
For the respondent - M Saravanan; M/s S Muthu & Co

Reported by Najib Tamby

JUDGMENT

Ahmad Fairuz Zainol Abidin JC:

Introduction

[1] The respondent was charged in the Magistrate's Court, Sungai Besar, Selangor under s. 41(1) of the Road Transport Act 1987 ("the Act"). The charge is as follows:

> Bahawa kamu pada 1.6.2014 jam lebih kurang 1130 hrs di KM 68 Jalan Parit 8, Jalan Teluk Intan - Klang, di dalam Daerah Sabak Bernam, di dalam Negeri Selangor, sebagai penunggang m/sikal no. Pendaftaran: BKE 2339 jenis Kawasaki telah memandu kenderaan tersebut di atas jalan raya dengan melulu menyebabkan kemalangan jalan raya dan kematian kepada penunggang m/sikal No: WWR 6085, nama: Muhammad Faidz b. Mohd Saiful Bahri, KPT: 941026085597. Oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 41(1) Akta Pengangkutan Jalan 1987 (pindaan 2000) dan boleh dihukum di bawah peruntukan yang sama.

[2] During the trial, the prosecution called three witnesses. At the end of the prosecution case, the learned Magistrate acquitted the respondent ("the first acquittal").

[3] The prosecution then filed an appeal to the High Court against the acquittal order and on 3 February 2017 the High Court allowed the appeal and directed the respondent to enter her defence. The defence case was heard before a different Magistrate. At the close of the defence case, the respondent was once again acquitted and discharged ("the second acquittal"). Being dissatisfied, the prosecution appealed to this court.

[4] After hearing submissions from both parties and perusing the appeal records, this court found that the defence put forward by the respondent had raised a doubt on the prosecution case. This court affirmed the second acquittal order of the Magistrate. The prosecution then filed an appeal against the order of this court.

The Case Of The Prosecution

[5] The prosecution case may be summarised as follows:

(i) On 1 June 2014 at about 9am, Zainah binti Ekom ("SP1") was driving her motorcar from Sungai Nibung to Sekinchan, Selangor along KM 68 Jalan Teluk Intan - Klang. She was together with her six-year old son. The weather was good and the traffic flow was smooth. SP1 testified that while driving along the main road, she saw a woman on her motorcycle, straddled on the divider of the road. She later went on to identify the painted divider as item marked "D" on the sketch plan P6. It was also shown in the photographs tendered by the prosecution (P7). It was after she passed the said woman that she heard a loud sound and upon her looking into her "cermin sisi belakang", she saw that an accident had occurred. She then saw a motorcycle slide by the left side of her car as a result of the said accident. Under cross-examination however, she denied witnessing the actual collision but merely heard a loud sound (dentuman) behind her. She explained what she meant in her police report P3 by what she meant as "lihat". It was not the actual collision but the effects after the collision. She could not identify the woman on the motorcycle as the respondent. She then stopped her car on the left shoulder of the road and then continued her journey. As a result of the incident, the motorcycle rider died while the respondent suffered serious injuries. SP1 lodged a police report (P2) later that night at about 11.17pm. The prosecution called Latifah binti Abdul Hamid ("SP2"), the mother of the deceased. She identified the deceased as her son. SP2 testified that the motorcycle used by the deceased did not belong to the deceased but to another son of hers. SP2 also lodged a police report (P3). The final witness called by the prosecution was the investigating officer Inspektor Afiq Azhar bin Azrul Hardav ("I/O") SP3. He testified that as the I/O on duty on the said day, he received a report at about 11.30am of an accident that occurred at KM 68 of Jalan Teluk Intan -

Klang. He then carried out the relevant investigation. The deceased was one Muhammad Faidz bin Mohd Saiful. The I/O testified that there was only one eyewitness to this case. The eyewitness he was referring to was SP1. SP3 had concluded that based on the eyewitness account, the cause of the accident was due to the respondent riding her motorcycle BKE 2339, recklessly into the path of the deceased who was riding his motorcycle WWR 6085. He had prepared the sketch plan P6 and also sent the two vehicles for inspection to PUSPAKOM and received an inspection report (P8).

The Case Of The Defence

[6] The respondent testified that on the morning of 1 June 2014, while she was riding her motorcycle along the said main road heading towards Sekinchan, she suddenly was knocked from the back by another motorcycle. She maintained that she was not riding her motorcycle on the divider as suggested by the prosecution. Instead, she testified that she was on the left lane of the main road ("B-C" in P6). She lodged a police report (P5). In cross-examination, she denied riding her motorcycle on the divider as suggested by the prosecution.

Issues Before This Court

[7] The learned DPP argued that the Magistrate had erred in law when he did not consider the totality of the prosecution evidence. She relied on the evidence of SP1 the sole eyewitness in the case. It was argued that the Magistrate fell into grave error when he ignored the fact that the respondent was seen riding her motorcycle on the divider in question and that this had invariably caused the accident. The scratch marks supported the contention where the accident took place somewhere SP1 had seen a woman riding the motorcycle and thus, urged the court to accept the version of the prosecution that there is enough inference to draw an inference that the respondent was guilty of reckless driving. The defence put forward by the respondent should be rejected as it was not supported by any evidence.

[8] Learned counsel on the other hand, argued that there was an identity issue involved as the respondent was never identified by the prosecution to be the person riding a motorcycle on the divider. It was also contended that the point of impact on the respective motorcycles does not support the version of events presented by the prosecution. Also, that there was no proof from the evidence presented that the deceased died from a motor vehicle accident. The defence version was that the respondent was knocked down from behind and the damage shown in the picture and PUSPAKOM report supported their version of the incident.

A **The Law**

[9] The essential ingredients of the offence created under s. 41(1) of the Act are:

(i) a person who,

B (ii) by driving a motor vehicle recklessly; or

(iii) by driving a motor vehicle at a speed; or

(iv) by driving a motor vehicle in a manner which, having regard to the circumstances (including the nature, condition and size of the road and
C the amount of traffic which is or might be expected to be on the road) is dangerous to the public;

(v) causes the death of a person

[10] Section 41(1) of the Act reads as follows:

D > Any person who, by the driving of a motor vehicle on a road recklessly or at a speed or in a manner which having regard to all the circumstances (including the nature, condition and size of the road, and the amount of traffic which is or might be expected to be on the road) is dangerous to the public, causes the death of any person shall be guilty of an offence and shall on conviction be punished with imprisonment for a term of not
E > less than two years and not more than ten years and to a fine not less than five thousand ringgit and not more than twenty thousand ringgit.

A translation of s. 41(1) of the Act in Bahasa Malaysia reads as follows:

> Mana-mana orang yang memandu suatu kenderaan motor di jalan
F > dengan melulu atau dengan kelajuan atau dengan cara yang, setelah mengambil perhatian tentang segala hal keadaan (termasuk jenis, keadaan dan saiz jalan, dan kesesakan lalu lintas yang dijangkakan yang ada atau mungkin ada di jalan itu, adalah merbahaya kepada orang awam, menyebabkan kematian mana-mana orang adalah melakukan suatu kesalahan dan apabila disabitkan hendaklah dihukum penjara selama
G > tempoh tidak kurang daripada dua tahun dan tidak lebih daripada sepuluh tahun dan denda tidak kurang daripada lima ribu ringgit dan tidak lebih daripada dua puluh ribu ringgit.

[11] Death as a result of the accident is not the sole determinant in deciding whether a person should face a charge under s. 41 of the Act.

H **[12]** In discussing dangerous driving under the equivalent of s. 41(1) of the Act, Raja Azlan Shah (as he then was) in *Ramiah v. PP* [1972] 1 LNS 120 held that under s. 34A of the Road Traffic Ordinance:

> It is not the law under section 34A of the Road Traffic Ordinance that merely because an accident had happened and a person had been killed,
I > danger had in that sense arisen and therefore it must follow, as the night, the day, that the Appellant was driving in a manner dangerous to the

public. In a case under section 34A, two things must be established. First, there must be a situation created by the accused which, viewed objectively, is dangerous. Dangerous driving is not defined in the Road Traffic Ordinance and it is up to the court to come to a decision on the evidence.

[13] The Court of Appeal discussed the subject in the recent case of *Ng Beng Kok v. PP* [2017] 7 CLJ 157. The Court of Appeal bench provided guidance of what constitutes an offence under s. 41 of the Act. It is clear from the grounds of the decision that there are three limbs under s. 41. Justice Zabariah JCA outlined the three limbs to be:

The above section, in our view, creates three distinct offences, namely

(a) driving a motor vehicle recklessly;

(b) driving a motor vehicle at speed; or

(c) driving a motor vehicle in a manner which having regard to all the circumstances (including the nature, condition and size of the road, and the amount of the traffic, which is or might be expected to be on the road) is dangerous.

See also *PP v. Mat Zali Lahman* [2010] 3 CLJ 354.

[14] For the purposes of this appeal, this court will focus on the first limb of s. 41 as the current appeal relates to a charge for driving recklessly (memandu dengan melulu). In *Ng Beng Kok (supra)* at p. 166, what constitutes driving recklessly was explained as:

Driving Recklessly

Black's Law Dictionary, Deluxe 9th Edition defined "reckless" in the adjectival sense as:

> Characterised by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk

"Reckless driving" is defined as:

> The criminal offence of operating a motor vehicle in a manner that shows conscious in difference to the safety of others.

From the abovementioned, **the word "reckless" connotes the deliberate taking of an unjustified risk. It implies an element of foresight. Thus, on a charge of reckless driving, proof of some actual foresight by the accused of the likelihood of certain consequences is necessary**. The test is, therefore, subjective and consequent *mens rea* is necessary of the offence. (emphasis added).

[15] What is pertinent for this court to note is the mental element that must be present and proven by the prosecution against a person driving recklessly. It is not an objective test but a subjective test.

[16] Therefore, it must be shown that there was such a deliberate risk taken by the respondent and some proof of actual foresight is required.

[17] In *PP v. Zulkifli Omar* [1998] 1 CLJ 1079; [1998] 6 MLJ 65. Reckless driving was regarded as a more serious category. In comparison to "speeding" and "dangerous driving", it was held that to be guilty of reckless driving, the driver must have created an obvious and serious risk of injury to the person or damage to property and must either have given no thought to the possibility of that obvious risk, or have seen the risk and nevertheless decided to run it.

[18] In discussing recklessness, the English Courts too expounded this category of culpability in many cases. One of which was discussed in *R v. Lawrence* [1981] 73 Cr App R 1; [1982] AC 510; [1981] 1 All ER 974; [1981] 2 WLR 524; [1981] RTR 217; [1981] Crim LR 409. The two-stage mental evaluation required to be applied was explained as:

> First, that the Defendant was in fact driving the vehicle in such a manner as to create an obvious and serious risk of causing physical injury to some other person who might happen to be using the road or of doing substantial damage to property; and secondly, that in driving in that manner the Defendant did so without having given any thought to the possibility of there being any such risk or, having recognised that there was some risk involved had nonetheless gone on to take it.

Duty Of The Court On Appeal

[19] It is perhaps apt for this court to remind itself of the parameters in determining this current appeal. Given that a court of coordinate jurisdiction has directed that the defence of the respondent was to be entered after the first acquittal, there can be no further review of the prosecution case by this court. This court must accept that a *prima facie* case has been made out by the prosecution.

[20] The duty of this court is limited to evaluating whether the defence has raised a doubt in the *prima facie* case of the prosecution. The Court of Appeal in *Azmi Osman v. PP & Another Appeal* [2015] 9 CLJ 845, at para. 28 clearly outlined this principle. Abang Iskandar JCA delivering the judgment of the court held:

> With respect, we are of the view that the learned HCJ2 had erred when he disturbed the findings of the earlier HCJ1 who had ordered the accused to enter his defence to all the four charges, on appeal. The dominant issue that ought to guide the HCJ2's mind in dealing with a situation that has now become this preliminary issue must of necessity be

the fact that when the HCJ1 made that decision for the defence to be called, the latter was carrying out his appellate jurisdiction. Granted that the High court jurisdiction is coordinate among its judges, inherent in that concept is the fact that a High Court Judge cannot overrule another High Court Judge who had made a decision at some crucial stage of proceedings in the same case. In the context of this appeal before us, the HCJ1 had ordered the accused's defence to be called to answer to the four charges levelled against him. The jurisdiction to correct that purported error, said by the HCJ2 as having been committed by the HCJ1, lies with the Court of Appeal, should there be an appeal against the decision of the HCJ2. In other words, as much as the High Court Judge's decision does not bind his brother or sister judge on the High Court bench, by the same token, neither does it lie with his brother or sister judge of the High Court to overturn his decision in the same case. *In a situation now prevailing, the role of the HCJ2 is only limited to see whether the defence evidence as led has succeeded in creating a reasonable doubt in the prima facie case as found by the HCJ1 on appeal by the prosecution.* With respect, this must be the preferred position as to what the proper approach ought to be, as was employed by the Court of Appeal in *Sulaiman*'s case *(supra)*. Coordinate jurisdiction connotes parity and as such, it does not admit nor permit mutual overriding or overruling each other's decision. Only a higher appeal Court can disturb or vary or affirm a High Court's decision. (emphasis added).

[21] However, this court has a duty to evaluate the case based on s. 182A of the Criminal Procedure Code.

182A Procedure at the conclusion of the trial:

(1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.

(2) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it.

(3) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.

[22] In *PP v. Tan Chai Hing* [2018] 6 CLJ 436, Justice Idrus Harun speaking for the Court of Appeal outlined the duties of a court at the conclusion of the trial. He held as follows:

[20] Under s. 182A of the Criminal Procedure Code, it is clearly the duty of the Court to consider all the evidence before it and it shall decide whether the prosecution has proved its case beyond reasonable doubt. This is a mandatory requirement as evident by the use of the word "shall" in that section. What it entails is that, at the end of the defence, it is incumbent on the Court to evaluate the entire evidence placed before it

A including the prosecution evidence. This was exactly what the learned judge had undertaken at the end of the defence case having considered the case of *Jaafar Ali v. PP* [1999] 1 CLJ 410; [1998] 4 MLJ 406 which succinctly stated the following useful guidelines:

> *It follows that in calling upon the accused to enter his defence the Court must*
> B *keep an open mind as to the accuracy of the prosecution evidence until the defence evidence has been tendered. At the close of the case for the defence and submissions, the Court must review the evidence adduced with regard to all the elements to be proved and then decide whether the prosecution has proved the case against the accused beyond reasonable doubt*. (emphasis added).

C **[23]** In considering whether the defence has raised a doubt on the *prima facie* case established by the prosecution, it is crucial for the court to compare the case of the prosecution against the case of the defence.

[24] In *Muhammad Rasid Hashim v. PP* [2013] 1 CLJ 333, Abdul Wahab Patail JCA held that:

D It is trite that the burden of proving its case beyond reasonable doubt remains always upon the prosecution, and the rebuttal or explanation by the defence therefore need only raise a reasonable doubt. See *Mat v. PP* [1963] 1 LNS 82 per Sufian J; *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ Rep 311. *The defence ought not to be brushed aside simply*
E *because it looks weak or because it is not believed. It is the Court's duty to consider that defence raised, and to decide whether it raises a reasonable doubt*. See *Ganapathy Rengasamy v. PP* [1998] 2 CLJ 1. The question could well be asked that if the version is not believed, how could it raise a reasonable doubt. The answer is that the direct question that the Court is required to address is not whether it believes the accused's version or not, but
F whether it raises a reasonable doubt. The best explanation of what is a reasonable doubt consistent with this approach is that given by Denning J in *Miller v. Minister of Pensions* [1947] 2 All ER 372:

> [The degree of cogency] ... need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt
> G does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable", the case is proved beyond reasonable doubt, but nothing short of that will suffice.

H [40] *It means that one is to take the version of the accused person and bring it along side the evidence adduced by the prosecution. If the accused's person's version is merely possible, then it is not enough to raise a reasonable doubt. But if, brought to condescend to the evidence before the Court, there is the least probability to it, then it is a reasonable doubt, and the accused must be acquitted*. (emphasis added).

I

[25] Lastly, this court is guided by the principle that an appeal is a continuation of proceedings by way of rehearing and an appellate court may subject the evidence to a critical re-examination (*Ahmad Najib Aris v. PP* [2009] 2 CLJ 800; [2009] 2 MLJ 613; *Mohamad Deraman v. PP* [2011] 3 CLJ 601; [2011] 3 MLJ 289).

Analysis By The Court

Evidence Of SP1

[26] SP1 during examination-in-chief testified that she had first heard the sound of a collision from the back of her car. It was then that she saw an accident had occurred from the side view mirror (cermin sisi). She testified that from the said mirror, she could see the accident was between the motorcycle she identified stopping on the divider and an unidentified motorcycle.

[27] During cross-examination, SP1 admitted that she did not witness the collision. Only after hearing a loud bang did she see a motorcycle slide pass on the left side of her car. She did not see which direction the motorcycle was travelling from but could confirm the accident.

Rujuk ID6

- Kemalangan berlaku selepas simpang.
- Selepas dentuman saya lihat motor tersebut terseret
- Semasa kemalangan, kedua-dua motor ini saya tidak nampak.
- Motor ini datang dari arah belakang dan terseret.
- Sama ada motor yang terseret ini mengekori saya sebelum kemalangan, saya tidak tahu.
- Motor yang terseret ini, arah perjalanannya saya tidak tahu dari mana ke mana.
- Saya tidak camkan perempuan yang naiki motor di tengah-tengah itu.

[28] When asked about her police report P2, SP1 agreed that it was mentioned in P2 that she had seen the accident. However, she stood by her evidence in court that she did not see the collision but merely heard the sound of a collision (dentuman).

Rujuk (P2)

- Setuju dari report saya ada nampak kemalangan.
- Tapi hari ini saya hanya katakan tidak nampak bagaimana kemalangan berlaku, cuma dengar dentuman.
- Ada penunggang motor yang tunggu di bahagian "D" saya pasti dan saya nampak.

[29] On the identification of the respondent, she testified that she could see that there was a woman on a motorcycle on the divider of the road (marked as "D" in P6 the sketch plan). However, she could not identify the person to be the respondent.

[30] During re-examination, SP1 explained that she made the report P2 because she witnessed an accident and explained that her understanding of "witnessing the accident" was when she saw the deceased's motorcycle drag along the road ("saya faham nampak kemalangan adalah bila motor itu terseret").

REX

- Kemalangan berlaku selepas simpang.
- Saya tidak camkan motor di tengah-tengah tetapi saya pasti dia adalah perempuan.
- Saya tidak kenal pada si mati dan keluarganya.
- Tiada sesiapa dari keluarga si mati datang berjumpa saya.
- Saya buat report sebab saya dah nampak kemalangan.

Rujuk (P2)

- Saya dengar kemalangan dan saya nampak motor seret.
- Saya faham nampak kemalangan adalah apabila motor itu terseret.
- Saya pasti dan nampak perempuan yang menaiki motor ini tunggu di "D".

Evidence of SP3 – The Investigating Officer

[31] The investigating officer (I/O) testified that he conducted the investigation over the incident. The salient points as contained at pp. 21 and 22 of the appeal records are reproduced below and are as follows:

Rujuk (P2)

- Ya, ini adalah report saksi tersebut dan saya ada merakam percakapan saksi ini.
- Hasil dari rakaman percakapan saksi, motor BKE berada di tengah jalan dan ingin masuk ke laluan si mati.
- Tiada saksi-saksi lain di tempat kejadian selain Zainah binti Ekom.
- Saya merujuk kedua-dua motor yang terlibat dalam kemalangan ini ke Puspakom.
- Tarikhnya saya tidak ingat.
- Di tempat kejadian hanya ada kesan calar sahaja.

- Point of impact mengikut gambar adalah pada ekzos sebelah kanan penunggang motor BKE 2339 dan ada di dalam gambar.

Rujuk (P7F - G)

- Point of impact dikesan melalui kesan perpindahan cat dan kerosakan.
- Saya pasti ini adalah kesan point of impact.
- Melalui hasil siasatan saya, punca kemalangan adalah motor BKE telah masuk ke laluan si mati dan merujuk pada rajah kasar di laluan "C - D".

Rujuk (P6)

- Dari siasatan saya, laluan si mati adalah dari bawah ke atas di lorong "C - D".
- Bagi motor BKE berada di laluan "D" dan masuk ke laluan "C - D".

Rujuk (P3)

- Punca kemalangan adalah penunggang motorsikal BKE yang masuk ke laluan si mati.
- Kerana dari keterangan saksi bebas yang menyatakan penunggang BKE yang berada di laluan "D" semasa dilihat dan masuk ke laluan si mati "C - D".
- Saya tidak pasti bila diserahkan dengan laporan post mortem dan saya boleh camkan.

Rujuk (P9)

- Ini adalah laporan yang saya terima.

M : SP3 camkan (P9).

- Saya tidak pasti bila terima laporan Puspakom, ada diserahkan pada saya dan boleh dicamkan.

Rujuk P8A - C

- Mengikut laporan Puspakom, motor BKE rosak teruk di bahagian kanan.
- Manakala motor WWR kerosakan teruk di bahagian hadapan.
- Berdasarkan laporan Puspakom dan point of impact ini adalah konsisten.

[32] Under cross-examination, the I/O testified that he was unsure if the accident was caused by the deceased.

[33] It is clear that the I/O relied on the evidence of the sole eyewitness SP1. He was clear and certain that the point of impact was on the right of the motorcycle used by the accused/respondent.

Evidence Of The Accused/Respondent

[34] The defence produced the respondent as the sole defence witness. The respondent gave her version of the incident. She denied stopping her motorcycle on the divider in the middle of the road. She testified that on the said day, she was on her way to Sekinchan riding her motorcycle BKE 2339. She was knocked from behind and suffered multiple fractures to both her legs, right hand and right thigh. She made a police report which she confirmed to be P5.

[35] Under cross-examination, she denied stopping on the divider in the middle of the road in question. The respondent denied that she collided into the deceased motorcycle WWR 6085. She denied riding her motorcycle in a dangerous and reckless manner causing her to collide into the deceased's motorcycle. She denied colliding her motorcycle into the deceased's motorcycle. She maintained under cross-examination that she was hit from behind.

[36] In short, the cross-examination of the respondent was aimed at getting her to agree that it was she who collided into the deceased's motorcycle, it was because she was careless and negligent. It was also put to her that she was speeding. She disagreed with all that was put to her.

[37] She maintained that based on P6 (sketch plan), she was travelling from the direction of "C" to "H". She maintained that she was on the left lane in P6 (between "B" and "C"). She ended her testimony by saying she was careful on the said day and it was the deceased who was not.

Whether The Defence Has Raised A Reasonable Doubt

[38] On the facts, it is evident there were no eyewitness that saw the fateful collision between the two motorcycles. SP1 being the only witness during the incident admitted that she did not see how the accident occurred but merely heard a loud sound behind her. She however, saw the impact of the accident.

[39] SP3 the I/O on the other hand, admitted that his investigation was based on his conclusion that there was an eyewitness that saw the accident. The said eyewitness he was referring to was SP1. Given the admission of SP1, it clearly shows that the foundation of investigative findings of the I/O had crumbled.

[40] What remains is the silent evidence. The scratch mark on the road is neutral evidence. It is evidence of an accident but it does not explain how it occurred. The PUSPAKOM report however, favours the version afforded by the respondent in her defence that she was hit from behind by another motorcycle as she was travelling along the road. The damage to her motorcycle was consistent with the explanation that she gave. The point of impact was on the right of the respondent's motorcycle and the damage to the deceased's motorcycle was to the front part. She was hit from the rear at angle that left the point of impact as shown in the photographs.

[41] The PUSPAKOM report exhibited as P8 detailed out the damage to each of the vehicles. At item 6 of the inspection report it reads:

(a) BKE 2339 - kerosakan yang diakibatkan oleh kemalangan;

(i) Bahagian hadapan motorsikal mudguard, cover set hadapan, handle dan belakang kiri kanan, lampu hadapan, signal kiri kanan, dan side mirror kanan tiada;

(ii) Handle motorsikal bengkok;

(iii) Bakul, ekzos, rim belakang, swing arm kanan, pemijak kaki dan padel gear bengkok; dan

(iv) Rim hub belakang pecah.

(b) WWR 6085 - kerosakan yang diakibatkan oleh kemalangan:

(i) Bahagian hadapan motorsikal remuk sehingga ke oil cooler;

(ii) Ekzos manifold, fork hadapan dan handle bengkok; dan

(iii) Sport rim hadapan patah.

[42] It is the finding to this court that the explanation of the respondent is supported by P8, the PUSPAKOM inspection report. The respondent's police report P5 materially corroborated her version of events.

[43] This court therefore, is left with two possible versions of how the accident could have been caused. It has raised a doubt on the *prima facie* case established by the prosecution. The respondent is entitled to the inference that favours her.

Whether The Prosecution Has Proven A Case Of Reckless Driving

[44] On the law, this court finds that the prosecution has failed to prove the element of recklessness on the part of the respondent. Given that it is a subjective test that is to be applied, there must be an inquiry into the mind of the said person on what his assessment of the danger that he posed. It has to be enquired upon whether he recognised the obvious and serious risk. Having said that did he not give any thought to the possibility of there being any such risk or, having recognised that there was some risk involved had nonetheless gone on to take it.

[45] In the current case before this court, there is very little that can be gleaned from the facts presented by the prosecution to suggest that an evaluation can be made of the mental element in this case.

[46] In the English system, this is a question of fact and the task is left to the jury as explained in *Lawrence (supra)*. In our context where a judge sitting alone is the determiner of fact and law, it is the duty of the court to ask these questions. Unfortunately, this court is unable to do so, given the unclear evidence produced in court by the prosecution. It is the finding of this court that the prosecution has failed to prove the element of reckless driving (memandu secara melulu).

[47] The law enforcement agencies must be able to distinguish the distinct limbs under s. 41 of the Act as identified in *Ng Beng Kok (supra)* before determining the charge against each accused person. There is a duty upon the prosecution to prove its case depending on which limb the case is premised on.

[48] In a reckless driving charge, a specific challenge on the recklessness of the action must be made. That the accused must have created an obvious and serious risk of injury to the person or damage to property and must either have given no thought to the possibility of that obvious risk, or have seen the risk and nevertheless decided to run it. See *Zulkiflee Omar (supra)*.

Whether This Court Ought To Apply Section 167 Of The Criminal Procedure Code

[49] In *Gurdit Singh Ajaib Sing v. PP* [1983] 1 CLJ 89; [1983] CLJ (Rep) 575, Dzaiddin J (as he then was) held:

> The powers of the Judge of a High Court in an appeal against sentence to alter a finding is found in s. 316(b) of the Criminal Procedure Code where it is stated that at the hearing of the appeal the Judge may in an appeal as to sentence:
>
> (i) reverse the finding and sentence and acquit or discharge the accused; or
>
> (ii) alter the finding, maintaining the sentence, or with or without altering the finding reduce or enhance the sentence or alter the nature of the sentence.
>
> (note : the above provision was amended by Act 1132 but has no bearing on the point in issue).

[50] Given that the powers of this court in exercising its appellate powers are wide, the question is whether this court ought to exercise its powers under s. 167 based upon the evidence presented by the prosecution.

[51] The general guidance on when to exercise powers under s. 167 of the Criminal Procedure Code was discussed in *Ahmad Abdul & Ors v. PP* [1987] 2 CLJ 207; [1987] CLJ (Rep) 437, Lim Beng Choon J held:

> Be that as it may, it is quite clear that the High Court in exercising its appellate jurisdiction is empowered under s. 316(b) of the Criminal Procedure Code to alter a finding and to substitute a conviction for a different offence. But in hearing an appeal from a conviction this power must be exercised subject to the provisions of ss. 166 and 167 of the Criminal Procedure Code. Thus in *Sivalingam v. PP* [1982] 2 MLJ 172, the Federal Court laid down this proposition. It was further stated in the judgment that to warrant a substitution **there must be clear evidence that a case for the substituted offence would have been made out or established in the Court below**. The Federal Court cited with approval the following passage from the judgment of Cussen J in *Ng Ee v. PP* [1941] MLJ 180:
>
> > The power of substitution of a conviction under a different provision of the law for the conviction found by the Magistrate is to be exercised with great caution, and **only where it is clear beyond all doubt, from the nature of the offence and the record of evidence in the case, that to do so can in no way prejudice the case of the accused**. It must be clear that if the substituted charge had in fact been the original charge the proceedings at the trial would have taken the same course, the evidence recorded been the same - that the prosecution evidence would have been unchanged (substantially) and the accused's evidence the same. (emphasis added).
>
> In *Lew Cheok Hin v. Reg* [1956] MLJ 131 @ 134 Taylor J, summarised the test which should be applied before an appellate Court could exercise the power to alter a conviction in this way:
>
> > There are two main tests. First, the facts must be such that the unframed charge was available from the start and could have been framed and tried concurrently under s. 165; secondly, the evidence must have been presented in such a way as to raise all the same issues of fact as would have been raised had the unframed charge been framed and trial claimed on it. Not only must the evidence for the prosecution be the same but the Court must be satisfied that the evidence for the defence would also have been the same.

[52] Section 41(4) of the Act provides the avenue to consider a lesser offence. It reads as follows:

> 41(4). The court may upon the trial of a person for an offence under this section convict such person of an offence under section 42 or section 43.

[53] In *PP v. Mat Zali Lahman* [2010] 3 CLJ 354 Zamani J held as follows:

> Though the identity of the deceased was not established, for that reason the legislature has, in all its wisdom, made express provision under s. 41(4) that "the court may upon the trial of a person for an offence under this section (ie, s. 41(1)) convict such person for an offence under s. 42 or s. 43: see *PP v. Zulkifli Omar* [1998] 1 CLJ 1079 at p. 1085. Just because an identity of the dead person involved in a road accident cannot be proved, it does mean the accused may get scot-free. Section 42 does not require proof of death as a result of a reckless or dangerous driving."

[54] The High Court in *Mat Lahman (supra)* found that there was evidence to suggest that the driver was driving dangerously. However, merely because the identity of the deceased was not proven, it did not absolve the accused of culpability. It allowed the court to consider a lesser offence of reckless and dangerous driving. The High Court directed that the driver answer a charge under s. 42 of the Act. This is a clear example of when s. 41(4) comes into play.

[55] Even if this court were to entertain the argument that the respondent had veered into the path of the deceased and urged this court to exercise the provision under s. 41(4) of the Act, there was no prosecution evidence to support such a finding. Substituting the charge for a lesser offence under s. 42 (Reckless and dangerous driving) or s. 43 (Careless and inconsiderate driving) of the Act will not be the panacea. When the basic facts itself do not stand up to measure for a case to be proven beyond reasonable doubt, this court is not obliged to consider an alternative case against the respondent. To do so on the current strength of evidence presented would prejudice the accused. As such, this court does not think that this a fit case to exercise its power under s. 167 of the Criminal Procedure Code and s. 41(4) of the Act.

[56] In *Sia Soon Suan v. PP* [1965] 1 LNS 165, [1966] 1 MLJ 116 at p. 118, His Lordship HT Ong Ang CJ (Malaya) in delivering the judgment of the Federal Court said:

> Nevertheless, the requirements of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective of whether this court is otherwise convinced in its own mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else. This is axiomatic.

Conclusion

[57] This court had embarked on an assessment of the defence case as guided in *PP v. Tan Chai Hing (supra)*. It is the finding of this court that the respondents have succeeded in raising a doubt on the *prima facie* case established by the prosecution. Furthermore, the Magistrate, having heard the accused/respondent testify has an advantage that he alone is privileged of. This court thus finds no reason to depart from the finding of the Magistrate.

[58] Whenever a criminal case decided on the basis of the truth of the prosecution case as against the falsity of the defence story, it is incumbent on a judge, in accordance with the time-honoured principle laid down in *Mat v. PP* [1963] 1 LNS 82; [1963] MLJ 263, even though is not satisfied with the defence story, must ask whether in spite of this, the defence story casts a reasonable doubt on the prosecution case. In this case, it has.

[59] It is for these aforesaid reasons that the appeal by the prosecution is dismissed and the decision of the Magistrate is affirmed.

A B C D E F G H I